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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-341

No. COA21-126

Filed 17 May 2022

Gaston County, No. 20 CVS 2140[1]

ESRAFIL ABEDI and SHAHLA ABEDI, Plaintiffs,

v.

FARID ABEDI a/k/a FARID ABEDI-ASL, MELANIE ABEDI, ELIZABETH ABEDI, CHELSEA ABEDI, LIBERTY BUILDING AND DEVELOPMENT, INC., and MELANIE ABEDI as TRUSTEE of the ELIZABETH AND CHELSEA ABEDI REVOCABLE LIVING TRUST DATED DECEMBER 19, 2018, Defendants.

Appeal by Defendants from Order entered 3 November 2020 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 19 October 2021.

Marcellino & Tyson, PLLC, by Clay A. Campbell, for plaintiffs-appellees.

DeVore, Acton & Stafford, P.A., by F. William DeVore, IV, and Brittany N. Conner, for defendants-appellants.

MURPHY, Judge.

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[1] Although the judgment lists the case number as 20 CVS 2041, every other document in the Record, including the complaint, lists the case number as 20 CVS 2140. As a result, we treat the judgment's case number as a typographical error and use 20 CVS 2140 as the case number.

¶ 1 This Court generally lacks appellate jurisdiction to review interlocutory orders. However, appellate jurisdiction may be conferred "when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Doe v. City of Charlotte*, 273 N.C. App. 10, 20, 848 S.E.2d 1, 9 (2020). Nevertheless, to confer appellate jurisdiction, "the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of [this] particular case demonstrate that the challenged order affects a substantial right." *Id.* at 22, 848 S.E.2d at 10 (citations omitted). Here, Defendants have not sufficiently explained why the facts of this particular case demonstrate that the challenged order affects a substantial right, instead merely relying on precedent. As a result, Defendants have failed to establish that we have appellate jurisdiction, and we dismiss their appeal as interlocutory.

BACKGROUND

¶ 2 In December 2017, Liberty Building and Development, Inc., a corporation involved in developing, marketing, and selling homes, purchased three lots in Gastonia (the "Lots"). On 19 December 2018, Liberty executed a non-warranty deed transferring ownership of the Lots to Defendant Elizabeth and Chelsea Abedi

Revocable Living Trust ("Abedi Trust").[2]

¶ 3 Around the same time, in December 2018, Defendant Farid Abedi, the sole shareholder of Liberty, was visiting his aunt and uncle, Plaintiffs Esrafil and Shahla Abedi. During Farid's visit with Plaintiffs, Plaintiffs allegedly agreed to provide $800,000.00 to Farid and Liberty so they could build houses on the Lots (the "Homes").[3] Plaintiffs allege that "[i]n exchange for the loan, Farid promised to repay Plaintiffs the principal sum of $800,000.00, to pay them ten percent of the principal amount, Eighty-Thousand Dollars ($80,000.00), as profits when the Homes and Lots sold, and to repay the interest they incurred to obtain the money they loaned Defendants." Sometime after December 2018, the Homes were built. On 15 April 2020, Abedi Trust sold one of the Homes for $499,999.00 and retained the proceeds.

¶ 4 Following the sale, Plaintiffs filed a *Verified Complaint* in Gaston County Superior Court on 23 June 2020. Plaintiffs' complaint alleged claims against Farid and Liberty for breach of contract, fraud, and unfair and deceptive trade practices based upon Plaintiffs' claim that ownership of the Lots was transferred to Abedi Trust at or about the same time as the alleged loan agreement. In response, Defendants

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[2] Defendant Melanie Abedi is the Trustee of Abedi Trust and Defendant Farid Abedi's wife. Defendants Elizabeth and Chelsea Abedi are the beneficiaries of Abedi Trust and the daughters of Farid and Melanie.

[3] Between 8 February 2019 and 8 July 2019, Plaintiffs sent four $200,000.00 wire transfers, totaling $800,000.00, to Liberty. There is a dispute over whether the $800,000.00 Plaintiffs sent to Farid was a loan, as Plaintiffs claim, or an investment, as Farid claims.

alleged that Abedi Trust owned the Lots before the alleged loan agreement. Plaintiffs alleged that, regardless, at the time of the loan agreement, Farid falsely represented that either Farid or Liberty owned the Lots and would continue to own the Lots. Additionally, Plaintiffs' complaint alleged claims against Farid, Liberty, Chelsea Abedi, Elizabeth Abedi, Melanie Abedi, and Melanie Abedi as Trustee of Abedi Trust for conversion, unjust enrichment, quantum valebant, quantum meruit, constructive trust, resulting trust, and accounting.

¶ 5 In addition to Plaintiffs' *Verified Complaint*, Plaintiffs filed a *Motion for Temporary Restraining Order and Preliminary Injunction* ("Plaintiffs' Motion") on 24 June 2020, seeking:

> 1. That the [trial] [c]ourt enter a Temporary Restraining Order requiring Defendants to deposit the proceeds from the sale of any of the Lots or Homes into the trust account of [Marcellino & Tyson, PLLC] or some other designated trust or escrow account for safekeeping until a decision is reached on the merits;
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> 2. That the [trial] [c]ourt enter a Preliminary and Permanent Injunction requiring Defendants to deposit the proceeds from the sale of any of the Lots or Homes into the trust account of [Marcellino & Tyson, PLLC] or some other designated trust or escrow account for safekeeping until a decision is reached on the merits;
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> 3. That the [trial] [c]ourt award Plaintiffs their reasonable attorney's fees and costs incurred in pursuing this Motion;
>
> 4. For such other and further relief as the Court deems just and proper.

Plaintiffs' Motion was heard in Gastonia Superior Court on 13 October 2018. Following the hearing, the trial court issued an *Order Granting Preliminary Injunction for Plaintiff* ("Order"). In its Order, the trial court granted Plaintiffs' Motion, stating:

> 1. That Plaintiffs are entitled to a Preliminary Injunction requiring Defendants to deposit the proceeds from the sale of the remaining Homes and Lots in the Trust Account of Marcellino & Tyson, PLLC, to be held in trust pending the resolution of the dispute between Plaintiffs and Defendants.
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> 2. Defendants may sell the Homes and Lots subject to depositing any proceeds in the Trust Account of Marcellino & Tyson, PLLC.
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> 3. Plaintiffs are not required to post a security bond as the money will be held in Trust by Plaintiffs' counsel pending resolution of this matter.

Defendants appeal from the Order.

ANALYSIS

¶ 6 Defendants acknowledge that the Order from which they appeal granted a preliminary injunction. Nevertheless, Defendants argue that the Order is immediately appealable because it is not interlocutory. In the alternative, Defendants argue that, assuming the Order is interlocutory, the Order is immediately appealable because the Order affects two substantial rights. First, Defendants argue that the Order deprives Abedi Trust of the right to use and control assets. Second, Defendants argue that the Order deprives Liberty of the right to

engage in its business of developing, marketing, and selling homes. We hold that Defendants have not sufficiently demonstrated that the Order is immediately appealable. Accordingly, we dismiss this appeal as interlocutory.

A. Interlocutory Appeal

¶ 7 Ultimately, Defendants argue that the trial court erred in granting Plaintiffs' motion for a preliminary injunction. However, as an initial matter, we must address whether this appeal is properly before us. We have stated explicitly that "[a] trial court's ruling on a motion for preliminary injunction is interlocutory." *SIA Grp., Inc. v. Patterson*, 254 N.C. App. 85, 87, 801 S.E.2d 707, 709 (2017). Nevertheless, Defendants argue that the Order in this case is not interlocutory and, therefore, immediately appealable because it is "mandatory, rather than purely prohibitory." We disagree.

¶ 8 A preliminary injunction is interlocutory in nature and not immediately appealable "unless it deprives the party enjoined of a substantial right which might be lost should the order escape review before final judgment." *City of Fayetteville v. E & J Invs.*, 90 N.C. App. 268, 270, 368 S.E.2d 20, 21, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 105 (1988); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). As noted by Defendants, preliminary injunctions may be classified as "prohibitory" or "mandatory." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). "The former are preventive in character, and

forbid the continuance of a wrongful act or the doing of some threatened or anticipated injury; the latter are affirmative in character, and require positive action involving a change of existing conditions—the doing or undoing of an act." *Id.* at 399-400, 474 S.E.2d at 787. Nevertheless, the classification of a preliminary injunction as mandatory or prohibitory does not determine whether a trial court's order granting a preliminary injunction is an interlocutory order. *See Dixon v. Dixon*, 62 N.C. App. 744, 744-45, 303 S.E.2d 606, 607 (1983) (citations omitted) (emphasis added) ("For [an appellant] to have a right of appeal from a *mandatory* preliminary injunction, 'substantial rights' of the appellant must be adversely affected. Otherwise, an appeal from such an *interlocutory* order is subject to being dismissed."); *see also Precision Walls v. Servie*, 152 N.C. App. 630, 634, 568 S.E.2d 267, 271 (2002) (treating a prohibitory preliminary injunction as interlocutory). Rather, an order granting a preliminary injunction is interlocutory if the "order is one made during the pendency of an action, [and] does not dispose of the case[.]" *Barnes v. Kochhar*, 178 N.C. App. 489, 496, 633 S.E.2d 474, 479, *appeal dismissed*, *disc. rev. denied*, 360 N.C. 644, 638 S.E.2d 461 (2006).

¶ 9 Here, the preliminary injunction at issue simply required the proceeds of the sales of the Homes and Lots to be withheld from Abedi Trust and placed "in the Trust Account of Marcellino & Tyson, PLLC, to be held in trust pending the resolution of the dispute between Plaintiffs and Defendants." As a result, the preliminary

injunction was issued during the pendency of the litigation and did not dispose of the case by determining the ultimate financial responsibility of the parties. Accordingly, the Order is interlocutory.

B. Substantial Right

¶ 10 "Generally, there is no right of immediate appeal from interlocutory orders . . . ." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, there are two avenues by which a party may immediately appeal an interlocutory order.

> First, an interlocutory order can be appealed pursuant to [N.C.G.S.] § 1A-1, Rule 54(b) [] if the trial court certifies the case for appeal and judgment is final as to some but not all claims. Second, under [N.C.G.S.] §§ 1-277(a) and 7A-27(d)(1) an interlocutory order can be immediately appealed if the trial court's holding[] [] deprives an appellant of a substantial right that would be lost without immediate appellate review[.]

Barnes, 178 N.C. App. at 496-97, 633 S.E.2d at 479 (citation omitted). Since Defendants present no argument or evidence that the trial court certified the case for immediate appeal, to properly hear this appeal we must find that the preliminary injunction deprives Defendants of a substantial right.

¶ 11 "To confer appellate jurisdiction based on a substantial right, 'the appellant must include in its opening brief, in the statement of the grounds for appellate review, sufficient facts and argument to support appellate review on the ground that the

challenged order affects a substantial right.'" *Doe*, 273 N.C. App. at 21, 848 S.E.2d at 9 (quoting *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438, *disc. rev. denied*, 372 N.C. 701, 831 S.E.2d 73 (2019)). We have warned that "[n]o hard and fast rules exist for determining which appeals affect a substantial right." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984). Therefore, "[i]t is usually necessary to resolve the question of whether there is a substantial right in each case by considering the *particular* facts of that case and the procedural context in which the order from which appeal is sought was entered." *Barnes*, 178 N.C. App. at 497, 633 S.E.2d at 479 (emphasis added). Consequently, "the appellant cannot rely on citation to precedent to show that an order affects a substantial right. Instead, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10 (marks and citation omitted).

¶ 12 Moreover, "we cannot 'construct arguments for or find support for [an] appellant's right to appeal from an interlocutory order.' The burden is on the appellant to do so[.]" *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10 (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Therefore, we are constrained to the specific arguments presented by Defendants and resolve the question of whether the preliminary injunction is immediately appealable

by considering the particular facts of this case. *Barnes*, 178 N.C. App. at 497, 633 S.E.2d at 479.

¶ 13 Here, Defendants argue that the preliminary injunction is immediately appealable because the preliminary injunction affects two substantial rights. First, Defendants argue that the preliminary injunction deprives Abedi Trust of the right to use and control assets. Second, Defendants argue that the preliminary injunction deprives Liberty of the right to engage in its business of developing, marketing, and selling homes.

1. Abedi Trust's Substantial Right

¶ 14 Defendants argue that the Order deprives Abedi Trust of the substantial right to use and control assets. We have held that the "right to use and control assets is a substantial right that warrants immediate review when that right is prohibited during the pendency of case resolution." *SED Holdings, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 635, 784 S.E.2d 627, 630 (2016), *appeal dismissed*, 373 N.C. 253, 853 S.E.2d 452 (2019). Nevertheless, Defendants have not sufficiently demonstrated that the Order deprives Abedi Trust of the right to use and control assets.

¶ 15 Here, the only asset that Defendants allege they are unable to use and control as a result of the Order is "over $1 million in assets that Defendants were directed to

place in a trust fund if they elected to sell the Homes . . . ."[4] We have held that a preliminary injunction that required a "large amount of money" to be placed in trust pending the resolution of a dispute impinged on an appellant's right to use and control assets. *See Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294, 647 S.E.2d 102, 104 (2007). Defendants cite to *Scottish* and summarily allege that, "[l]ikewise, the preliminary injunction at issue here impinges on [] Defendants['] right to the use and control of a large amount of money." This argument by Defendants insufficiently demonstrates why, under the facts of *this* case, the Order deprives Defendants of the substantial right to use and control assets. *Doe*, 273 N.C. App. at 21-22, 848 S.E.2d at 9-10; *Barnes*, 178 N.C. App. at 497, 633 S.E.2d at 479.

¶ 16 Defendants have not demonstrated why depositing the proceeds in the Trust Account of Marcellino & Tyson, PLLC, rather than Abedi Trust, deprives Defendants of the ability to use and control the assets. Defendants have not explained how the terms that govern Abedi Trust differ from those governing the Trust Account of Marcellino & Tyson, PLLC. For example, Defendants have not demonstrated how,

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[4] In addition, Defendants argue that "the volatility of the real estate market increases the risk of loss or depreciated value of the Homes and Lots should any sale be delayed." Here, pursuant to the Order, "Defendants may sell the Homes and Lots subject to depositing any proceeds in the Trust Account of Marcellino & Tyson, PLLC." Therefore, even assuming that the Homes are the assets Defendants allege they are unable to use and control, Defendants have not demonstrated how the Order deprives them of the right to use and control the Homes.

under the terms of Abedi Trust, they would be able to use the proceeds if the proceeds were placed in Abedi Trust. As a result, Defendants have not demonstrated how depositing the proceeds of the Homes in the Trust Account of Marcellino & Tyson, PLLC, rather than Abedi Trust, deprives Defendants of the ability to "use" the proceeds. Therefore, while Defendants are unable to "control" the proceeds of the sales of the Homes if the proceeds are to be placed in the Trust Account of Marcellino & Tyson, PLLC, Defendants have not demonstrated how the Order deprives them of the right to both "use *and* control assets." *SED Holdings, LLC*, 246 N.C. App. at 635, 784 S.E.2d at 630 (emphasis added).

¶ 17 As we have warned in the past, "[w]hether a particular ruling affects a substantial right must be determined on a case-by-case basis." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10 (marks and citation omitted). Here, Defendants have not presented a sufficient argument to support appellate review by explaining why the facts of the particular case before us demonstrates that the Order affects a substantial right. Indeed, "[Defendants'] failure to adequately assert how the challenged order affects a substantial right may be partly explained by [Defendants'] fixation on a published case that they believed to be controlling." *Id.*

2. Liberty's Substantial Right

¶ 18 Defendants argue that the preliminary injunction deprives Liberty of the substantial right to engage in its business of developing, marketing, and selling

homes. "Our courts have recognized the inability to practice one's livelihood as a substantial right." *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002). In addition, we have indicated that the right to practice one's livelihood is essentially the right to operate one's business; therefore, operating one's business may properly be considered a substantial right. *See Bessemer City Express v. City of Kings Mt.*, 155 N.C. App. 637, 640, 573 S.E.2d 712, 714 (2002), *disc. rev. denied*, 357 N.C. 51, 579 S.E.2d 384 (2003). Nevertheless, Defendants have not demonstrated that the preliminary injunction here prevents Liberty from engaging in developing, marketing, and selling homes.

¶ 19 First, the preliminary injunction allows the sale of the Homes. The preliminary injunction only requires the proceeds from the sales of the "remaining Homes and Lots," if Defendants so choose to sell the Homes, to be placed "in the Trust Account of Marcellino & Tyson, PLLC, to be held in trust pending the resolution of the dispute between Plaintiffs and Defendants." Therefore, nothing in the Record demonstrates that the preliminary injunction deprives Liberty of the substantial right to engage in its business by marketing and selling homes.

¶ 20 Second, Defendants have made no argument to demonstrate that, without immediate access to the proceeds from the sales, Liberty is unable to develop, market, or sell homes. In fact, Defendants have not demonstrated that Liberty would receive *any* of the proceeds of the sales of the Homes. Rather, Defendants contend that the

proceeds of the sales of the Homes would be placed in Abedi Trust. As a result, nothing in the Record demonstrates that the proceeds of the sales of the Homes being placed in the Trust Account of Marcellino & Tyson, PLLC, rather than Abedi Trust, deprives Liberty of the substantial right to engage in its business by developing, marketing, or selling homes. Therefore, Defendants have not explained "why the facts of [this] particular case demonstrate that the challenged order affects a substantial right." *Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10.

¶ 21 As noted previously, "we cannot 'construct arguments for or find support for [an] appellant's right to appeal from an interlocutory order.' The burden is on the appellant to do so[.]" *Id.* (quoting *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254); *Barnes*, 178 N.C. App. at 497, 633 S.E.2d at 479. Therefore, we are constrained to the specific arguments presented by Defendants. Here, Defendants have not demonstrated that the Order deprived Abedi Trust of the substantial right to use and control assets. In addition, Defendants have failed to demonstrate that the Order deprived Liberty of the substantial right to engage in its business of developing, marketing, and selling homes. As a result, Defendants have not sufficiently demonstrated that the Order deprives Defendants of a substantial right. Accordingly, "we must dismiss the appeal for lack of appellate jurisdiction." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438.

CONCLUSION

¶ 22 Defendants have not sufficiently demonstrated that the Order deprives Defendants of a substantial right that would be lost without immediate review. Accordingly, we must dismiss this interlocutory appeal for lack of appellate jurisdiction.

DISMISSED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).